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No. 92-1202

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

GARY KNOP, et al,

Petitioners,

v.

KENNETH L. McGINNIS, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

DID THE COURT OF APPEALS APPLY AN INCORRECT STANDARD IN DETERMINING WHETHER THERE WAS EVIDENCE OF A SUFFICIENT DEGREE OF FAULT BY SUPERVISORY STATE PRISON OFFICIALS TO IMPOSE LIABILITY ON THEM FOR AN ALLEGED CONSTITUTIONAL VIOLATION CAUSED BY LOWER LEVEL NON-PARTY EMPLOYEES USING RACIAL SLURS AGAINST PRISON INMATES?

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COUNTERSTATEMENT OF THE CASE

This class action lawsuit was filed in 1984 by several prison inmates alleging unconstitutional prison conditions at the State Prison of Southern Michigan, Michigan Reformatory, Marquette Branch Prison, and Riverside Correctional Facility. The Petitioner class consists of those inmates confined in these institutions. Respondents are management officials and do not include the State of Michigan or the Michigan Department of Corrections.

In their amended complaint, Petitioners alleged that their constitutional rights were violated due to inadequate physical and mental health services, unsanitary conditions, lack of access to the courts, and lack of protection from harm. Within the claim of lack of pro-

tection from harm, Petitioners alleged that desirable jobs were disproportionately assigned to white inmates, that cafeteria serving lines were segregated by race, that black inmates were assigned to punitive segregation in disproportionate numbers; that white inmates were assigned to protective custody in disproportionate numbers; and that white staff displayed attitudes of racially motivated hostility toward black inmates. Petitioners complained that racial tension contributed to the atmosphere of violence, hence, is included in the claim of protection from harm.

Following a trial on the merits and dismissal of many of the claims, the District Court issued an opinion and order on the issues of legal mail; lack

of adequate winter clothing; lack of in-cell toilets and wash basins at the Riverside facility; access to courts; and, racial discrimination. App. to Pet. at 42a-135a. Following the submission of proposed remedial plans, the Court issued a final opinion and order. App. to Pet. at 136a-168a.

With respect to the racial claims presented, Petitioners prevailed on none, except the claim of racial harassment in the form of racial slurs. The District Court found that Respondents did not intentionally discriminate against black inmates in the administrative segregation or the punitive segregation process. App. to Pet. at 118a-119a. There was little or no evidence that the hearing officers or the security classification

committees intentionally discriminated against black inmates. Id. Petitioners did not establish that racially motivated misconduct ticketing practices existed. Id.

The District Court also found that Petitioners did not satisfy their burden of proof relative to the claims of segregation in the dining lines and the eating areas. App. to Pet. at 125a-128a. Petitioners were able to voluntarily choose a dining line and eating area. Id. at 127a.

Petitioners also did not prevail on their claim that Respondents intentionally discriminated against black inmates by assigning the white inmates to the higher level, more prestigious jobs. App. to Pet. at 128a. In fact, the Court

found that Petitioners' statistics showed no overwhelming racial disparities and that on many occasions, the disparity, if any, was insignificant. Id. at 129a.

The only allegation relative to a racial issue upon which Petitioners prevailed is that related to the use of racial slurs. The District Court found that although most correctional staff did not use racial slurs, the number that did was large enough to expose the inmates to a "constitutionally intolerable atmosphere of racial harassment." App. to Pet. at 122a. Although the named Respondents, as individuals, did not condone the use of racial slurs, the Court held that the Department of Corrections (not a Respondent) was liable for the racial slurs of certain non-party correctional

officers. Id. at 124a, 123a, respectively.

The Court ordered that "JUDGMENT is entered FOR defendants and AGAINST plaintiffs on plaintiffs' claim that black inmates at the subject facilities are, as a class, subjected to intentional racial discrimination in violation of the equal protection clause of the Fourteenth Amendment; JUDGMENT, however, is entered FOR plaintiffs and AGAINST defendants on plaintiffs' claim that they are subject to racial harassment in the form of racial slurs." App. to Pet. at 135a. The Court opined that "every governmental entity is obligated, albeit not always constitutionally required, to expend every effort to eradicate it [racial discrimination] completely from public

life." App. to Pet. at 135a. Disappointed that the Department of Corrections was not "completely meeting that obligation", Id., the Court imposed an elaborate grievance process coordinated by the Legislative Ombudsman's Office. App. to Pet. at 152a-158a. This process included a detailed, progressive discipline system for the guilty correctional officers and maintenance of a record system to monitor the incidences of racial slurs. Id.

Respondents appealed the orders of the District Court on several issues, including the issue of racial slurs. The Court of Appeals held that although racial harassment can form a basis for liability on the part of individuals, supervisory officials are not liable for such conduct by their subordinates with-

out evidence that the officials encouraged or directly participated in the conduct. App. to Pet. at 32a. The appellate panel found that the failure to investigate the racial harassment claims did not rise to the level of conduct required for the placement of liability on Respondent officials. Id.

SUMMARY OF ARGUMENT

This Court's rules caution that "review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. This petition clearly fails to meet this threshold requirement. Petitioners attempt to bring their arguments before this Court on the premise

that the Court of Appeals opinion is "sharply at odds with other Circuits". In fact, the Sixth Circuit applied the applicable standard of liability to the facts at hand.

Petitioners argue that the Sixth Circuit should have adopted the "deliberate indifference" standard as articulated in City of Canton v. Harris, 489 U.S. 103 (1989), a case decided one month prior to the submission of Petitioners' final appellate brief. The holding in City of Canton clearly sets forth a standard to be applied when a local government's failure to properly train its employees causes a constitutional violation. City of Canton is distinguishable from this case in that there is no local government defendant, and there is no

allegation of failure to train employees. The issue is to what extent supervisory officials of a state government can be held liable for the actions of their subordinates. The Court of Appeals reviewed the findings of the District Court and concluded, on the specific facts of this case, that the Respondent state supervisory officials are not liable for the actions of their subordinates since they did not encourage or participate in the misconduct.

The Sixth Circuit made no ruling at odds with other circuits since, on the facts of this case, the "encourage and participate" standard it applied is not substantively different than the "deliberate indifference" standard discussed in City of Canton.

Moreover, 42 U.S.C. § 1983 does not provide a remedy for every wrong, including negligence, defamation, or other state law tort. It is intended to provide relief for constitutional violations. On the facts of the instant case the verbal harassment, including the use of racial slurs by a few non-party prison employees, however repugnant, does not form the basis of a constitutional violation by the Respondent supervisory state officials under this statute.

The District Court specifically did not find a constitutional violation on any race discrimination claim. The Court did, however, attempt to weave a claim of racial slurs used by a minority of correctional officers, who were not named as defendants, into a pattern of behavior,

then attributed this conduct to a "policy practice or custom" of the Michigan Department of Corrections which is also not a defendant. Following this analysis, the District Court imputed a constitutional violation to Respondent supervisory officials. This approach is incorrect as a matter of law and is unsupported by the record and the Court of Appeals was correct in rejecting it.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT APPLY AN INCORRECT STANDARD IN DETERMINING WHAT DEGREE OF FAULT MUST BE EVIDENCED IN ORDER TO IMPOSE LIABILITY ON SUPERVISORY STATE PRISON OFFICIALS FOR A CONSTITUTIONAL VIOLATION CAUSED BY LOWER LEVEL NON-PARTY EMPLOYEES USING RACIAL SLURS AGAINST PRISON INMATES.

The petition is based upon the assertion that the Court of Appeals used an improper standard in evaluating the degree of fault which must be shown to impose liability on these individual supervisory Respondents for the conduct of other non-party employees. Petitioners' contentions are based upon the fact that the Court of Appeals opinion does not recite the phrase "deliberate indifference" and does not cite the case upon which Petitioners now heavily rely.

Respondents submit that when the Court of Appeals opinion is properly viewed in the context of the facts of this case, it becomes apparent that the standard used by the Court of Appeals is not substantively different than the standard Petitioners espouse and that because the outcome of this case depends solely upon its own unique facts, this decision is not in conflict with decisions of this Court or other courts of appeal.

The District Court found that the Respondents do not condone the use of racial slurs, that the "vast majority" of prison employees do not engage in such conduct, App. to Pet. at 124a, but that the use of such language by a minority of prison employees (who were never named as defendants) constitutes racial harassment

which is a "policy, practice or custom of the Department of Corrections" (which also was never named as a defendant). App. to Pet. at 123a. The Court found that the individual supervisory Respondents "have failed to implement policies that would prevent this situation from occurring, and affirmatively encourage its continuation." App. to Pet. at 124a. The District Court did not cite any evidence of specific affirmative conduct by Respondents to support this conclusion and Respondents deny that there is any such evidence in the record. The Court of Appeals examined the record and concluded, App. to Pet. at 32a: "The defendants' failure adequately to investigate claims of racial harassment in this case did not, in our view, rise to the level of 'encouragement.'"

Respondents do not agree that the use of racial slurs by a minority of prison employees who are not named as parties constitutes a basis for imposing liability on the individual supervisory Respondents under 42 U.S.C. § 1983. This Court has recognized the difference between the question whether a plaintiff's harm was caused by a constitutional violation and the question whether another entity has a sufficient degree of fault to be deemed responsible for that violation. City of Canton, supra, 489 U.S. at 388, n. 8; Collins v. City of Harker Heights, Texas, 503 U.S. ___, 117 L. Ed. 2d 261 (1992). Nevertheless, assuming arguendo that the use of racial slurs can constitute a constitutional violation, it is apparent that the District Court and Court of Appeals both applied the same substantive

standard to evaluate whether the individual Respondents evidence a sufficient degree of fault to subject them to liability. The outcome of this case simply depends on the fact that the District Court and Court of Appeals disagree whether Respondents' actions encouraged a constitutional violation.

Petitioners attempt to superimpose case law applicable to the imposition of liability on municipalities for improper training of employees onto the realm of the standards applicable to imposing liability on individual state officials. In Monell v. Dept. Soc. Serv. of City of New York, 436 U.S. 658, 694 (1978), this Court held that, unlike state governments which are protected by Eleventh Amendment immunity, local governments may them-

selves be liable under 42 U.S.C. § 1983 when the execution of a governmental policy or custom causes a constitutional violation. In the instant case, there is neither a local government defendant nor a documented injury. There is not even a state government defendant. The Respondents here are individual state government officials, primarily the Director of the Michigan Department of Corrections and several prison wardens.

Petitioners improperly rely on principles of municipal liability which were reiterated by this Court in City of Canton v. Harris, supra. The issue in City of Canton was whether a municipality can ever be held liable under 42 U.S.C. § 1983 for constitutional violations resulting from its failure to train

municipal employees. Id. at 380. This Court held that "[r]espondent superior or vicarious liability will not attach under § 1983", but that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 385, 388. The Court cited from earlier decisions and elaborated upon the meaning of the phrase "deliberate indifference," Id. at 388-389:

> ...a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation". *** "[M]unicipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. *** Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality--a policy as defined by our prior cases--can a city be liable for such a failure under § 1983.

Monell and its progeny, including City of Canton, have no direct application in the context of state governmental entities or officers since those cases deal only with imposition of liability on a local governmental entity for the entity's own actions. The Monell principles simply do not control in the instant case, which deals only with allegations of liability of individual state governmental supervisory officials for the conduct of lower level state employees who were never named as defendants. The issue of failure to train state corrections officers or any state employees was never alleged or litigated in the instant case.

Respondents in this case include the Director of the Michigan Department of

Corrections, the Deputy Director of Correctional Facilities Administration, Regional Prison Administrator, and four prison wardens. Liability of these officials cannot be established absent a clear showing that they had a sufficient degree of fault to be deemed responsible for a constitutional violation arising from the activity that forms the basis of the complaint.

A pervasive pattern of unconstitutional conduct flowing from a deliberate plan by the named defendants must be shown. Rizzo v. Goode, 423 U.S. 362, 375 (1976). A failure to act is insufficient to prove liability. Id. at 375-76. The supervisor must be shown to have "encouraged the specific incident of misconduct or in some other way directly

participated in it." Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir.), cert. den., 469 U.S. 845 (1984). Without more, failure to supervise, control, or train government employees is insufficient. Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982). It is the above principles that were relied upon by the Court of Appeals in deciding the merits of Petitioners' claim. App. to Pet. at 31a-32a. Under the facts of the instant case, the standard applied by the Court of Appeals is not substantively different than the standard Petitioners espouse in the petition.

Citing Hays, the trial court found in a conclusory fashion that the Department of Corrections, not the Respondents, "explicitly or implicitly authorizes,

approves, or knowingly acquiesces in the unconstitutional harassment of black inmates by certain staff officers." App. to Pet. at 123a. None of the named Respondents were specifically cited for any conduct indicating encouragement or participation in the offensive conduct of correctional officers. Under the guise of a purported failure to act, the District Court improperly imputed the acts of non-party correctional officers to Respondents and improperly imposed vicarious liability. App. to Pet. at 122a-125a.

The Court of Appeals properly rejected this approach and held that Respondents' failure to adequately investigate reports of racial slurs did not rise to the level of encouragement

required to impute liability to these supervisory personnel. Id. at 32a.

The use of racially derogatory language may support hostile work environment claims under Title VII. Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985). See Powell v. Missouri State Highway and Transportation Department, 822 F.2d 798 (8th Cir. 1987). A claim based upon Title VII, however, will not support an action pursuant to 42 U.S.C. § 1983 unless there is also an infringement of rights guaranteed by the Constitution. Day v. Wayne County Board of Auditors, 749 F.2d 1199, 1204-1205 (6th Cir. 1984); see also, Poe v. Haydon, 853 F.2d 418, 428 (6th Cir. 1988). Thus, although the use of racial slurs may give rise to relief in other

causes of action, a constitutional violation is necessary to prevail under 42 U.S.C. § 1983. Paul v. Davis, 424 U.S. 693 (1976).

In the instant case, the District Court specifically found that the named Respondents individually did not condone the use of racial slurs. App. to Pet. at 124a. Instead, the court concluded that the Department of Corrections, not a named defendant, was liable for the unconstitutional harassment of black inmates by "certain staff officers." Id. at 123a. An attempt was then made to impute this liability to Respondents in their official capacities. Id. at 124a. Ironically, in the judgment and order, the Court specifically ruled against Petitioners on the claim that black

inmates were subjected to intentional racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. App. to Pet. at 135a. The court ruled for Petitioners on the claim "that they are subject to racial harassment in the form of racial slurs", Id., without a finding of a constitutional violation.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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